U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: DEC 28 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on April 2, 2012. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In the present matter, the petitioner failed to submit a statement regarding if the validity of the decision of the AAO has been or is the subject of any judicial proceeding.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a computer software engineer specializing in information systems security and cybersecurity. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO upheld the director's findings on appeal.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states:

> Exemption from job offer. The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest. To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a

> showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, the AAO generally does not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The AAO previously found that the petitioner's work is in an area of intrinsic merit and that the proposed benefits of his work would be national in scope. However, the AAO determined that the petitioner had failed to establish that he fulfilled the third eligibility factor set forth in *NYSDOT*. The AAO stated:

> In this instance, the petitioner has barely documented his past employment, let alone established that his past contributions set him apart from others in the field to an extent

> that would warrant the special, additional benefit of an exemption from the job offer requirement that, by statute, normally applies to the classification he seeks.

On motion, the petitioner asserts that the standard in *NYSDOT* is inappropriate and that the AAO erred in relying thereon. By law, the AAO does not have the discretion to reject published precedent. *See* 8 C.F.R. § 103.3(c), which indicates that precedent decisions are binding on all USCIS officers. The petitioner contends that requiring that he serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications represents a "more rigorous standard of qualification" and runs contrary to the intent of Congress. *NYSDOT*, however, does not represent a fundamental change in the underlying law, but rather an interpretation of already-existing regulations. To date, neither Congress nor any other competent authority has overturned the precedent decision, and the petitioner's disagreement with that decision does not invalidate or overturn it.[1] In fact, one federal court has rejected the argument that the precedent decision violates the Administrative Procedure Act, stating:

> Plaintiff also argues that the adoption of *NY[S]DOT* as a precedent decision is a violation of the APA's notice and comment requirement. *See* 5 U.S.C. § 553(b) & (c). However, notice and comment proceedings are not required when an agency adopts an interpretive rule. *See* 5 U.S.C. § 553(b)(A). *NY[S]DOT* is clearly interpretive because it does not create new rights or duties, but rather "provides a reasonable and predictable interpretation" of the statute. *See Mejia-Ruiz v. INS*, 51 F.3d 358, 364 (2d Cir.1995). Thus, Plaintiff's claim of a violation of the APA's notice and comment requirement fails as well.

Talwar v. INS, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001).

The petitioner devotes much of his brief to allegations that *NYSDOT* misconstrued Congressional intent and applied an incorrect standard. Rather than dissect these arguments in detail, the AAO will observe that Congress is presumed to be aware of existing administrative and judicial interpretations of statute. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In this instance, Congress' awareness of *NYSDOT* is a matter not of presumption, but of demonstrable fact. In 1999, Congress amended section 203(b)(2) of the Act in direct response to the 1998 precedent decision. Congress, at that time, could have taken any number of actions to limit, modify, or completely reverse the precedent decision. Instead, Congress let the decision stand, apart from a limited exception for certain physicians, as described in section 203(b)(2)(B)(ii) of the Act. Because Congress has made no further statutory changes in the decade since *NYSDOT*, the AAO can conclude that Congress has no further objection to the precedent decision.

---

[1] Congress has subsequently amended the Act in 1999 to facilitate waivers for certain physicians. *See* section 203(b)(2)(B)(ii) of the Act. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *NYSDOT*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

The petitioner comments on previous unpublished decisions in which USCIS "had denied an application for an NIW by a Statistician but had approved the NIW application of a Statistician with experience in Data Mining applicable to Genetics, Fraud Detection and Intrusion Prevention citing the particular alignment of the area of specialization with the national interest." The petitioner, however, failed to submit copies of these unpublished decisions in the classification sought. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Instead, the petitioner submits a copy of an unpublished June 21, 2005 AAO decision in the classification sought pertaining to an analytical chemistry researcher in which the AAO remanded the matter to the director for consideration of the alien's work during the period of his Ph.D. studies and for consideration of the citation history of the alien's published work. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the aforementioned unpublished decisions. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner points to *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010) in which the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi). The AAO's appellate decision in the present matter, however, did not unilaterally impose any novel substantive or evidentiary requirements beyond those set forth in the regulations. Rather, the AAO relied on relevant, published, standing precedent by following the guidelines set forth in *NYSDOT*. The AAO agrees with the petitioner that the standard of proof is preponderance of the evidence. The "preponderance of the evidence" standard, however, does not relieve the petitioner from satisfying the eligibility factors set forth in *NYSDOT*. In the present matter, the documentation submitted by the petitioner fails to demonstrate by a preponderance of the evidence that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The petitioner asserts that he has previous experience in the areas of "Information Systems Security/Cybersecurity" that were "specifically mentioned by the President of the United States of America in an executive order as being critical to the national interest." As previously noted in the AAO's appellate decision, it is the position of USCIS to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *NYSDOT*, 22 I&N Dec. at 217. The petitioner submits a February 23, 2000 job offer letter from VPNet Technologies, Inc. offering him the position of Senior Customer Support Engineer, but the letter does not identify the petitioner's past work experience or the specific technological advancements made by the petitioner in the areas of information systems security or cybersecurity. The petitioner also lists seven roles that he performed a[redacted], but he failed to submit letters from these companies detailing his work experience and past contributions in the field. The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence of experience "shall" consist of letters from employers. There is no documentary evidence showing

that the petitioner's work to develop security software and related products sets him apart from others in the information systems security and cybersecurity fields. As previously discussed, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 158. The documentation and arguments presented on motion fail to demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The AAO's appellate decision also noted an additional ground for denial. Although the petitioner submitted two copies of Form ETA-750B with his initial petition, the duplicates he submitted were photocopies dated March 18, 2005. The USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate." Among other things, the Form ETA-750B lists an alien's employment over the last five years and any degrees or certificates received. The Form ETA-750B from March 2005 did not provide information about the petitioner from June 2005 to June 2010. The AAO found that the petitioner's resubmission of the outdated photocopies was insufficient to satisfy the central purpose of the form. The AAO stated: "The petitioner did not execute this required document for the petition, and therefore the petitioner has not properly applied for the national interest waiver." The petitioner states on motion that he has refrained from working since the termination of his employment with Caymas Sytems, Inc. in 2006 until filing this petition on June 28, 2010. The petitioner's lack of employment from 2006 – 2010, however, does not excuse his failure to submit an updated, fully executed Form ETA-750B, in duplicate, at the time of filing as required by the regulation at 8 C.F.R. § 204.5(k)(4)(ii).

In this matter, the petitioner has failed to support his motion with any persuasive legal argument, precedent decisions, or other comparable evidence to establish that the AAO's appellate decision was based on an incorrect application of law or USCIS policy. Accordingly, the motion to reconsider will be dismissed.

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motion to reconsider is dismissed, the decision of the AAO dated April 2, 2012 is affirmed, and the petition remains denied.